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SUMMARY RECORD OF THE 30th MEETING

Chairman:	Mr. ZARIF	(Islamic Republic of Iran)
later:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Miss BOTERO (Colombia) said that the law of the non-navigational uses of international watercourses was of crucial importance to her country. Pursuant to General Assembly resolution 46/54, paragraph 9, her delegation wished to comment on the draft articles adopted on first reading by the International Law Commission.

2. Her delegation believed that the draft articles must maintain the proper balance between the rights and duties of watercourse States. Colombia agreed that the scope of the draft articles should be limited to international watercourses and should not be extended to other watercourses. There must be a clear definition of the term "international watercourse", rather than a vague reference to "a system of surface and underground waters", as that might create difficulties from the point of view of management.

3. If the purpose of the draft articles was to enable watercourse States to enter into watercourse agreements, then their provisions must be illustrative and general. The fulfilment of a State's obligation to negotiate in good faith for the purpose of concluding an agreement with respect to a project which might adversely affect one or more other watercourse States should not be a condition for the execution of such a project; the purpose of providing for that obligation was to ensure that if there was a risk of serious harm, appropriate measures would be taken to minimize or to eliminate the potential effects. The obligation to cooperate in order to attain optimal utilization and adequate protection of an international watercourse should be binding on all watercourse States. Moreover, the obligation of watercourse States not to cause appreciable harm should apply only with regard to activities directly or indirectly carried out by them, and not to damage resulting from external factors.

4. Her delegation believed that notification concerning planned measures with possible adverse effects, the period for reply to notification, the reply to notification or the absence thereof, and the establishment of a joint management mechanism were matters which should be decided on by watercourse States themselves by means of agreements.

5. Once the deadline of 1 January 1993 established in General Assembly resolution 46/54, paragraph 9, had passed, recommendations could be made to the Assembly concerning the legal nature of the draft articles and the body to which they should be submitted for the second reading.

6. Mr. AL-BAHARNA (Bahrain), referring to the programme and working methods of the Commission (A/47/10, chap. V), noted with satisfaction that the

(Mr. Al-Baharna, Bahrain)

Commission had decided, as stated in paragraph 366 of the report, that it would endeavour to complete by 1994 the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. Bahrain also welcomed the Commission's intention to make substantial progress on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" and to undertake work on one or more new topics during the term of office of its current membership. Nevertheless, his delegation had been disappointed to learn from paragraph 362 that the Commission had put aside, for the time being, its consideration of relations between States and international organizations; it was to be hoped that the Commission would revert to the topic at a later date. His delegation further hoped that the Commission would not entirely abandon the programme of work which it had drawn up in 1991, as the selection of new topics was not an easy task. If the Commission was to reclaim its role as the principal body responsible for the progressive development and codification of international law, it must be given a new impetus by the Sixth Committee. The Committee must assign to the Commission topics which transcended the traditional boundaries of international law.

7. His delegation reiterated the proposal made at the previous session that the Commission should consider the feasibility of studying the legal aspects of the new international economic order, with a view to codifying the doctrine of permanent sovereignty over natural resources and strengthening the Charter of Economic Rights and Duties of States. That question was at the heart of current international controversies; in order to embark upon a consideration of that area, the Commission would need a mandate from the Committee.

8. His delegation in principle supported the proposals contained in paragraph 371 of the report concerning the composition and working methods of the Drafting Committee.

9. It was satisfying to learn from paragraph 374 that the Commission had considered the question of its contribution to the United Nations Decade of International Law. At the same time, the proposal to prepare a publication which would aim at presenting an overview of the main problems of international law on the eve of the twenty-first century appeared, in the light of the Commission's current work programme, to be overambitious. If the proposal was to be implemented, however, his delegation suggested that a more modest theme should be chosen. A study of ways and means of improving the effectiveness of international law might be of practical use to the international community.

10. The recommendations contained in paragraph 373 concerning ways of improving the preparation and content of the Commission's report were of particular interest. His delegation endorsed the suggestions in

(Mr. Al-Baharna, Bahrain)

subparagraphs (5) and (6) that the summary of debates should give emphasis to trends of opinions, rather than to a detailed recording of individual views, and that the presentation of fragmentary results achieved in the consideration of a topic or an issue should be avoided.

11. Bahrain supported the Commission's decision, reflected in paragraph 376, to defer consideration of the question of dividing its annual session into two parts.

12. Mr. DE SARAM (Sri Lanka), referring to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", said that transboundary harm principally resulted from malfunctions in seemingly harmless activities carried out in a source State, or from activities in a source State which were acknowledged to be harmful. The two main aspects to be considered in the codification and progressive development of the applicable international law in such cases related to the measures that must be taken to prevent or reduce the possibility of the occurrence of transboundary harm, and the liability which would ensue where transboundary harm had occurred.

13. It had been agreed that the Commission should first consider preventive measures, and then, at a subsequent stage, the issues of liability and compensation. There were, however, reasons to question that order of priorities, and it seemed likely that fundamental differences of view would emerge in the course of any discussion of the difficult issues raised by liability and compensation. For example, would it be more helpful to the victims of transboundary harm if both the source State and the entity responsible for carrying out the activity were to be held liable for transboundary harm? And should such liability be residual or based on fault?

14. At the same time, there did appear to be agreement on certain fundamental issues. It was generally recognized that industrial development and technology must not be overencumbered, and that there might well be cases in which transboundary advantage also accrued from potentially harmful activities. Similarly, there was general agreement that the victims of transboundary harm should not be left without adequate compensation. There seemed therefore to be a need for rules which would facilitate, to the extent possible and in the least costly manner, the expeditious presentation and consideration of claims. From that standpoint, there was much to be said for greater recourse to the advisory jurisdiction of the International Court of Justice and additional insurance arrangements. The principal objective was the speedy and adequate coverage of conceivable damage, rather than determination of culpability. Useful international legislation in that regard had already been concluded under the auspices of the International Maritime Organization in the aftermath of the Torrey Canyon and Amoco Cadiz incidents. However, much work on questions relating to the insurance and reinsurance of risks of catastropic damage remained to be done, and it might be appropriate for the Commission to devote further consideration to those issues in due course.

15. Mr. HALLAK (Syrian Arab Republic) said that international circumstances had prevented agreement over the long-discussed question of the establishment of an international criminal court. His delegation concurred with much of paragraph 396 of the report (A/47/10), in particular points (i) and (iii). There was an urgent need for an international criminal jurisdiction, since national courts and jurisdictions appeared ineffective with regard to an important category of international crimes. The proposed international court should not have compulsory jurisdiction. Its competence should be limited to crimes of an international character, including crimes defined in the draft Code of Crimes Against the Peace and Security of Mankind; the establishment of an international criminal court should ensure an objective and unified interpretation of such a Code. However, it should remain possible for a State to become a party to the statute of the court without thereby becoming a party to the Code. There must be maximum flexibility regarding subject-matter jurisdiction, which would be easily achieved if the Code and the statute of the court were separate instruments. The treaty establishing the court should not prevent the court from being brought into a relationship with the United Nations either through an agreement pursuant to Articles 57 and 63 of the Charter or by any other means. Applicable law, penalties, due process, procedures and rules might be discussed when the General Assembly requested the Commission to draw up a statute of the court.

16. With respect to the reports of the Special Rapporteur on State responsibility, and in view of the remarks contained in paragraph 122 of the report of the Commission, his delegation felt that the Commission should exercise great caution in dealing with the subject of countermeasures, which should be examined carefully in the light of the provisions of the Charter regarding collective security.

17. International liability for injurious consequences arising out of acts not prohibited by international law was a highly complex area, in which fault and strict liability seemed to overlap to a certain degree, which made it all the more difficult to establish an acceptable theoretical foundation. He hoped that the Commission would be able to deal with that topic in an effective manner in order to arrive at a generally acceptable instrument.

18. As to the law of the non-navigational uses of international watercourses, his delegation was pleased that the Commission had decided to transmit the draft articles provisionally adopted on first reading through the Secretary-General to Governments for comments and observations in preparation for a second reading of the draft articles. It also welcomed the decision of the Commission not to pursue further, for the time being, the question of relations between States and international organizations.

19. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

20. Mr. AKAY (Turkey), referring to the proposal to establish an international criminal jurisdiction, said that there appeared to be a genuine desire on the part of the international community to set up such a court in

(Mr. Akay, Turkey)

order to bring to justice the perpetrators of crimes against humanity. The issue had become particularly urgent in the light of the widespread and grave breaches of the Geneva Conventions that were taking place in Bosnia and Herzegovina: bringing those responsible for such wanton aggression before a court would have a deterrent effect on potential offenders. Such a court would also serve as an appropriate forum for the trial of offences involving international drug trafficking or crimes against diplomats and other internationally protected persons. However, the issue needed to be examined in greater detail, and in any case as a question separate from that of the draft Code of Crimes. Although his delegation had not arrived at a definitive position, it believed that the jurisdiction of the court should be ad hoc, and that major legal and political issues would have to be resolved with regard to extradition.

21. Additional difficulties would arise in connection with the rights of intergovernmental and non-governmental organizations to institute proceedings before the court.

22. The deliberations of the International Law Commission on that subject should be preceded by a resolution of the Sixth Committee requesting comments from Governments, thus largely obviating the need for future amendments to the statute of the proposed court.

23. The topic of State responsibility involved very complex aspects of both a legal and a political nature, and the question of countermeasures, which would be covered in part two of the draft articles, was particularly intractable, involving as it did the need for a clear definition of the concept of an "injured State". Countermeasures played an extremely important role in conflicts arising from breaches of treaties, and it was not unknown for States which themselves were responsible for breaches of international treaties to claim the status of injured States.

24. Mr. AROSEMENA (Panama), referring to chapter II of document A/47/10, said that the establishment of an international criminal court had been a goal of the international community since the end of the Second World War, in response to horrendous acts of genocide perpetrated during that conflict. Currently, the question of an international criminal trial mechanism and the draft Code of Crimes against the Peace and Security of Mankind were acquiring new relevance in the light of the events in the former Yugoslavia and other parts of the world. Accordingly, his delegation believed that the time had come to establish a standing, full-time, international judicial body.

25. In his delegation's view, the draft Code of Crimes and the question of the establishment of an international criminal court were closely interrelated and could not be dealt with separately. There could not be a code of crimes against the peace and security of mankind unless there was an international criminal jurisdiction to administer it; likewise, without such a code, a court would lack objective competence. For that reason, if a State became a party to the court's statute, it must thereby, ipso facto, become a party to the

(Mr. Arosemena, Panama)

Code; at the same time, a State party to the Code should have the option of applying any other international treaties mentioned in the statute.

26. His delegation also believed that the court's jurisdiction should be binding, irrespective of the nationality of the accused, with regard to all the crimes defined in the draft Code of Crimes and in other international conventions. In other words, international law should take precedence over national law. It was in the interest of small States, including Panama, that there should be a uniform international criminal justice system to which they could have access, since they often had neither the requisite infrastructure nor adequate security mechanisms to bring accused persons to trial.

27. The applicable penalties and procedure should be stipulated in the court's statute so as to ensure due process. National law would be resorted to only if there were aspects not covered by the court's statute. Every State party to the statute should be required to hand over to the court any alleged perpetrator of a crime within its jurisdiction, and such transfer to the court should not be regarded as extradition. The procedure for the handing over of accused persons should be defined in the statute.

28. His delegation supported the establishment of an independent standing prosecutorial organ for the purpose of initiating cases and bringing defendants before a court. If that should prove unfeasible, then at least in the first phase, an independent prosecutor should be appointed on an ad hoc basis, as recommended by the Working Group in paragraph 506 of document A/47/10. Any State, whether or not it had become a party to the statute of the court, should have the right to institute proceedings.

29. The many possibilities and alternatives outlined in the reports of the Special Rapporteur and the Working Group demonstrated the feasibility of establishing an international criminal court. Those possibilities should be discussed thoroughly with a view to arriving at a consensus text. If the international community did not have the resources to establish such a mechanism immediately, short-term solutions could be found, such as utilizing the infrastructure of the International Court of Justice or the Office of the Legal Counsel of the United Nations. His delegation supported the Working Group's recommendation that the expenses relating to the court's operation should be borne by the States parties to its statute.

30. Mr. SOLIMAN (Egypt) said that, in the context of the third and fourth reports of the Special Rapporteur on State responsibility, countermeasures were a reflection of the imperfect structure of the international society which had not yet succeeded in establishing an effective centralized system of law enforcement. At the same time, recent developments affecting the form and character of international relations were opening encouraging prospects for the adoption of an approach that was in harmony with the current reality of such relations. Despite the apparent factual inequality between States with regard to possible intervention and economic reprisals, the draft articles

(Mr. Soliman, Egypt)

should reflect the realities of international life, inasmuch as countermeasures were actually used, and should endeavour to establish a framework of restrictions and conditions that prevented their arbitrary use and took account of the particular situation of the developing countries and the ways in which they differed from the developed countries. Egypt therefore supported the view that countermeasures should be placed under collective control and should not be regarded as a punitive instrument, but only as a means of urging a country that had committed a wrongful act to abide by the international rule of law. Self-defence did not come within the framework of countermeasures, which should be restricted to acts that did not call for the use of force, and measures of retortion had no place in a draft on State responsibility, for the reasons given by the Special Rapporteur. In the use of the suspension and termination of treaties as countermeasures, it was essential for the procedures laid down in the 1969 Vienna Convention on the Law of Treaties to be followed, in particular those in its article 60.

31. The draft articles should contain a settlement regime, particularly in light of the fact that positive developments in international relations would encourage such a trend. The exhaustion of amicable settlement procedures as a precondition for resort to countermeasures would not be to the advantage of the wrongdoing State, and such a condition would be a guarantee of the non-arbitrary use of countermeasures.

32. The existence of an internationally wrongful act was recognized as the sine qua non condition for lawful resort to countermeasures, since it was difficult to rely solely on the bona fide conviction of the State concerned. There must be several objective signs in addition to the existence of an internationally wrongful act, including refusal to negotiate or refusal to accept resort to a settlement procedure. Since the adoption of a countermeasure found its justification in the prejudice caused by an internationally wrongful act, the draft articles should incorporate the Special Rapporteur's definition of countermeasures as "the generality of the reactions of a State in response to a breach of international law by which it is injured". The wrongful act must give rise to "damage" in the broad sense of encompassing legal or moral injury.

33. It was essential that the draft articles on State responsibility should be subordinate both to the provisions of, and to the procedures provided for in, the United Nations Charter on the maintenance of international peace and security and, in particular, to any recommendations or decisions adopted by the Security Council in the discharge of its functions with respect to dispute settlement and collective security. The Security Council had the power to oversee the use of countermeasures and to indicate whether, in any given case, it believed them to be disproportionate, and it might request a State to delay the taking of countermeasures. The words "as appropriate" should therefore be deleted from article 4 of part two as provisionally adopted, since the draft articles should not be inconsistent with the Charter provisions. His delegation did not agree with the views of some delegations concerning the

(Mr. Soliman, Egypt)

concept of pre-emptive self-defence, because they were not in accord with the clear provisions set forth in Article 51 of the Charter.

34. His delegation disagreed with the Special Rapporteur in his attempt to show that, in the case of a violation of a multilateral obligation concerning human rights or the environment, all States were in the same position. The International Court of Justice, in the case concerning Military and Paramilitary Activities in and against Nicaragua, had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States which, in a somewhat artificial sense, could be said to be "legally affected".

35. As recommended by the Working Group established by the Commission, the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be understood as comprising both issues of prevention and of remedial measures. Despite the recommendation of the Working Group that a decision on the nature of either the articles to be drafted or the eventual form of the instrument that would emerge should be postponed, his delegation supported the view that the articles should, within reason, be of a mandatory character so as to contribute to the progressive development and codification of the rules of international law. Although the practice of the Commission was in accordance with the recommendation of the Working Group, it might be better if the Commission decided on the nature of the instrument before completing preparation of the articles in the light of the special nature of the topic. Rather than elaborating a declaration or statement of principles on the topic, the Commission should formulate well-defined rules of a mandatory character. Priority should be given to the topic, since the progress made thus far had been very slow.

36. Although the title of the topic dealt only with liability, it was essential that the articles should include rules on the prevention of harmful acts, and that they should not be assigned to an annex but have the same mandatory force as the other articles.

37. In connection with draft article 1, on preventive measures, it was important that prior authorization should be obtained, that it should be granted by the State concerned only after an assessment of the impact of the activity in question, and that States should withhold authorization until the operators had obtained insurance.

38. The principle of notification and information embodied in draft article 2 was fundamental, and it was in accord with existing principles in Egyptian internal law. His delegation welcomed the requirement that the State of origin should seek the assistance of competent international organizations in determining the impact of harmful activities, an idea that was endorsed by the Convention on Biological Diversity of 5 June 1992.

(Mr. Soliman, Egypt)

39. Draft article 4, on prior consultation with regard to activities with harmful effects, was the cornerstone for preventive measures. The prior consultations provided for in articles 4, 5 and 7 should have the aim of obtaining the agreement of the affected State on a regime governing such activities. His delegation differed with the view expressed in the Commission that the term "consultation" was very often used in cases where there was no obligation to obtain consent, and it did not agree that article 4 nullified article 5, concerning alternatives to an activity with harmful effects. A second paragraph should be added to article 5 to the effect that if the operator did not put forward alternatives which made the activity acceptable, the State of origin was obliged to withhold authorization. Article 8, on the settlement of disputes, was useful and necessary, and its inclusion strengthened Egypt's view that the draft articles should be of a mandatory character.

40. With regard to the definition of risk proposed by the Special Rapporteur in connection with article 2, on the use of terms, his delegation agreed with the view expressed in the Commission that it was difficult to reach agreement on the use of qualifying terms such as "appreciable", "substantial" and "significant" before agreement on the content of the articles themselves, and that it was necessary to distinguish in that connection between activities that posed a risk and those that had a harmful impact.

41. Mr. LAOUANI (Tunisia) said that the instruments formulated by the Commission were an expression of the teachings of the most highly qualified publicists of the various legal systems and schools in the world, and as such, even before they entered into force, they could be implemented by the International Court of Justice under Article 38, paragraph 1 (d) of its Statute.

42. His delegation took note of the Commission's decisions regarding its organization of work, and encouraged it to make substantial progress on the subject of international liability for injurious consequences arising out of acts not prohibited by international law. It welcomed the Commission's decision to prepare a publication presenting an overview of the main problems of international law on the eve of the twenty-first century, in the context of the Decade of International Law.

43. On the question of an international criminal jurisdiction, his delegation supported the Commission's establishment of a working group; its mandate fully accorded with the request made by the General Assembly in resolution 46/54. The Commission's work on the draft Code of Crimes and on the question of an international criminal jurisdiction would help strengthen the rule of law in international relations. The formulation of a Code of Crimes which reconciled the different concepts of the various legal systems and the establishment of an international criminal jurisdiction to implement the provisions of the Code would fill a void.

(Mr. Laouani, Tunisia)

44. The establishment of an international criminal court would inevitably involve problems of compatability with the domestic law of States and the competence of their courts. A balance must be found between the principle of respect for the sovereignty of States and the need to strengthen the implementation of international law. His delegation supported the view that initially the court should be a flexible mechanism; that approach would make it possible to overcome the political difficulties deriving from State sovereignty and the legal difficulties deriving from the competence of States. It also felt that the only law applied by the court should be the Code of Crimes, which should contain all applicable rules in respect of penalties, procedures and the precise definition of crimes. Such an instrument would be clear and precise. While his delegation supported the draft Code adopted by the Commission at its forty-third session, it believed that some of its articles, and particularly article 9, needed further review; the Commission should therefore continue its work on the draft Code and draft statute.

45. In connection with State responsibility, the delicate question of countermeasures arose. His delegation preferred the term "countermeasures" to "reprisals". There had clearly been no unanimity in the Commission on the question of whether there should be a codification of countermeasures. His delegation felt that the scope of countermeasures should be limited and strictly defined, as a constructive means of promoting law and strengthening guarantees against the risks of abuse of countermeasures. The conditions for the legality of countermeasures set forth in draft article 11 gave rise to many problems because the concepts of a "wrongful act" and an "adequate response" were not made clear, leaving open the possibility of imprecise or subjective judgements. The Commission must ensure that factual inequalities between States did not work to the advantage of the strong. Particular attention should be paid to developing countries, which did not have the same capacity for reaction or countermeasures as developed countries. Countermeasures should not be punitive, but should aim to secure an end to the wrongful act. They must therefore be different from sanctions.

46. His delegation encouraged the Commission to continue its consideration of the question of international liability for injurious consequences arising out of acts not prohibited by international law during the current quinquennium, since, at a time when the entire world was launching an offensive against environmental deterioration, the Commission's work would represent a very important contribution to the development and codification of international law. The topic should be considered in stages, and priorities should be established among the aspects to be considered. His delegation agreed that the subject should first be considered in its preventive dimension. The draft articles should therefore first envisage the preventive measures required in respect of activities involving risk and then the remedies needed when those activities actually caused transboundary harm. At the same time, the Commission should not lose sight of the urgent need to regulate activities which actually caused transboundary harm.

(Mr. Laouani, Tunisia)

47. The Commission should define a theoretical basis for the topic that would be generally acceptable. It could draft directives or declarations of principle which would fill the theoretical void and make it easier to reach agreement on the content of the future articles. The Commission should base its work on the achievements of the United Nations Conference on Environment and Development and the universal consensus on protection of the environment.

48. His delegation felt that it was premature to decide on the final form of the instrument to be drawn up; the Commission should be guided by the current and future needs of the international community and by the contribution the draft articles could make to the codification of international law.

49. Mr. CAMACHO (Ecuador) said that, on the question of State responsibility, and specifically of countermeasures, his delegation fully shared the view that countermeasures were a reflection of the absence of an effective centralized system of law enforcement and that, given the current level of development of international law, they would continue to be needed for a long time to confront internationally wrongful acts. However, as noted by the Commission, countermeasures were often the prerogative of the more powerful States. They did not afford protection to weaker States, and were frequently used as an instrument of intervention or aggression. It was therefore important to define carefully the conditions under which countermeasures could be applied. In that context, his delegation felt that articles 11, 12, 13 and 14 left many problems unresolved.

50. His delegation was particularly concerned that under draft article 11, the determination that a wrongful act had been committed was left to the State which took countermeasures, thereby making it possible for the supposedly injured State to become a judge and a party to the conflict; and draft article 13 did not indicate any criteria for application, thereby allowing the State taking the countermeasures to determine subjectively the type, conditions and amount of reparations demanded. Those two provisions could give rise to greater problems than those that the draft articles set out to solve, and could make it possible for a State, on the pretext of making reparation for a wrongful act, to use countermeasures to commit even greater crimes. Much work needed to be done on the draft articles before his delegation could approve them.

51. Mr. ZMIEVSKIY (Russian Federation) said that the question of international liability for injurious consequences arising out of acts not prohibited by international law was of great significance both currently and for the future. It involved establishing a global legal regime which would effectively protect man and the environment from the rapidly accelerating negative consequences of development, above all in the scientific and technical fields, which were threatening the very foundations of life on earth. The Commission's work once again confirmed the significance of consolidating the efforts of the community of nations on the basis of international law, in order to confront the challenge posed by the realities

(Mr. Zmieyvskiy, Russian Federation)

of the nuclear age, which had intertwined the fates of all States and peoples.

52. It was somewhat disappointing that the Commission, after 14 years, had not yet achieved the desired results. It was apparent from the report (A/47/10) that there was still no agreement among members of the Commission in respect of the conceptual framework of the topic, the concept of "international liability" or the form of the instrument to be drawn up and the legal force of its norms. Of course, the situation was to a considerable extent caused by objective factors, above all the complexity of the questions involved at the international and national levels.

53. Steps must be taken to intensify the Commission's work and make it more productive. His delegation supported the Commission's decision that future consideration of the topic should be carried out in stages and that priorities should be established. It agreed that prevention should be considered first, and, only then, remedial measures.

54. The idea of a civilized dialogue should underpin the concept of international liability; it would make it possible to maintain a balance of interest of all the parties involved. Important components of such a dialogue were the requirement that States should assess potential transboundary harm; regulation of activities capable of causing harm, notification and information, prior consultation, alternatives to an activity with harmful effects, and procedures for the peaceful settlement of disputes.

55. The delicacy and unpredictable scope of the problems that arose made it necessary to take into account other factors involved, including the level of economic development of States, the need to balance their interests, fairness, and due care. The idea of establishing an effective international insurance system should be studied in detail. The possibilities of charitable organizations and voluntary funds could also be drawn upon in that respect. Various international organizations could contribute to a just solution of questions of international liability.

56. A flexible approach was needed to the question of the form of the instrument, since agreement on questions of substance would help in finding adequate solutions with regard to the legal nature of the norms to be worked out. The instrument that was drafted could alleviate and, if possible, eliminate the tension that arose in respect of problems of international liability, thereby contributing to the development of good relations among States in a spirit of good-neighbourliness, mutual understanding and trust.

57. Mr. PELIÇARIC (Croatia) said that the need for an international criminal court was increasingly felt within the international community. The present situation in the former Yugoslavia, the widespread human rights violations and atrocities against civilians and the practice of so-called "ethnic cleansing" demanded urgent action.

(Mr. Pelicaric, Croatia)

58. A report prepared under the auspices of the Conference on Security and Cooperation in Europe expressed the view that the establishment of a permanent international criminal court would take considerable time, and strongly advised against waiting for such a court to be established before action was taken against the serious criminal acts committed in connection with the armed conflict in the territory of the former Yugoslavia. His delegation was therefore in favour of establishing an ad hoc international tribunal for crimes committed in Croatia, Bosnia and Herzegovina and other parts of the former Yugoslavia. His Government had repeatedly proposed the holding of international trials for war crimes, crimes against humanity and international law, and crimes of genocide committed in the territory of the former Yugoslavia, so that all perpetrators and organizers of such crimes, irrespective of their nationality, religion or present whereabouts, might be brought to justice. Croatia was fully prepared to cooperate with experts in that field, and had already offered to do so.

59. With regard to the question of the applicable law, the authors of the aforementioned report had examined the Penal Codes of the Socialist Federal Republic of Yugoslavia and Croatia, and had come to the conclusion that their provisions constituted a sufficient legal basis for the administration of justice with respect to suspected war criminals in the former Yugoslavia. In that connection, it should be noted that Croatia, but not the Federal Republic of Yugoslavia, had abolished the death penalty.

60. Besides having legal and humanitarian importance, the establishment of an ad hoc international tribunal would also be of the greatest political importance, in that, it would significantly contribute towards stopping and resolving conflicts in the region as a whole. His delegation therefore suggested that the proposed tribunal should have jurisdiction in respect of the entire territory of the former Yugoslavia. In conclusion, he expressed the hope that the General Assembly would renew the mandate of the International Law Commission to proceed with the work of drawing up the necessary rules for an international criminal jurisdiction.

61. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

62. Mr. TOMUSCHAT (Chairman of the International Law Commission), noting the wealth of comments and ideas put forward during the Committee's consideration of the report of the Commission on the work of its forty-fourth session, said that the summary records, as well as the customary topical summary of the discussion held in the Sixth Committee, would be brought to the attention of the Commission's members. In addition, the Special Rapporteurs would receive the original texts of all statements made on their respective topics. The Committee's views not only were a most valuable source of inspiration for the Commission's work, but also served as an irreplaceable gauge of the extent to which that work was meeting the needs of the international community at any given time. He was gratified to note that, subject to certain reservations, the report had on the whole been well received by the Committee. The

(Mr. Tomuschat)

Commission would, of course, take all critical comments fully into consideration.

63. Referring to the Commission's preliminary work on the statute of an international criminal court, he noted that a clear majority of delegations had supported the suggestion that a new mandate should be given to the Commission to go ahead with that project. Some delegations had even expressed the view that the drafting process could be completed within a year; others had struck a more cautious note, stressing the need to give Governments a full opportunity for an in-depth examination of all the implications. The point had been made that the commitment implicit in formally entrusting the Commission with drawing up the statute of an international criminal court would have limited scope, its significance being simply that making a start on the legislative process was considered worthwhile. In giving the Commission a clear mandate, the General Assembly could at the same time request it to pay special attention to any comments that Governments might wish to make by early 1993. In any event, the Commission would do its utmost to adapt its working methods to the challenge which a mandate to elaborate the statute would represent. While acknowledging the formidable character of the task, it did not shy away from it, and would make every effort to work as expeditiously as possible.

64. While it had generally been recognized that the draft Code, once completed, should be one of the instruments to be applied by the court, a clear majority of speakers had argued that the court should not be automatically linked with the Code. At the same time, it had been felt that because of the principle nullum crimen sine lege - lex being understood as written law - the court should not be called upon to base its sentencing of criminals on rules of customary law. The proposition that the court should have power only over individuals but not over States had received unchallenged support; the question of the character of the court, on the other hand, had given rise to more divergent views, a considerable number of delegations feeling that the mechanism envisaged by the Commission failed to meet the requirements of stability and predictability.

65. Turning to the topic of State responsibility and, in particular, to the draft articles on countermeasures suggested by the Special Rapporteur, he noted that while all delegations had agreed that the matter should be approached with extreme caution because countermeasures had sometimes served as a pretext for unlawful conduct on the part of powerful States to the detriment of weaker States, not all delegations had drawn the same conclusions from that premise; some took the view that countermeasures did not form a necessary element of a regime of State responsibility and should be left aside, and others favoured the inclusion of countermeasures in the rules governing State responsibility. The latter group of delegations, which had also been the larger one, had argued that countermeasures not only were a fact of international life, but also had a useful function in upholding the international legal order, inasmuch as they constituted one of the few

(Mr. Tomuschat)

remedies which international law placed at the disposal of the injured State. No one, however, had denied that resort to countermeasures should in any event be made subject to strict criteria of admissibility. Some link with procedures for the peaceful settlement of disputes had been generally advocated, although views had differed on whether complete exhaustion of all available procedures should be a condition for resorting to countermeasures, or whether it would be sufficient to establish, for instance, an obligation to suspend countermeasures as soon as the alleged wrongdoer was prepared to accept a binding settlement procedure. The Commission would greatly benefit from the debate when embarking upon the issue in the Drafting Committee at the beginning of its next session.

66. The topic of liability for injurious consequences arising out of acts not prohibited by international law had also received a great deal of attention. Many delegations had deplored the fact that after 14 years of grappling with the topic the Commission had still not definitively approved a single provision. Reiterating the hope expressed in his introductory statement that a fresh start could be made on the topic on the basis of the conclusions reached by the Working Group established at the forty-fourth session, he said that the Commission would carefully consider the criticisms expressed with regard to the new instructions given to the Special Rapporteur. The United Nations Conference on Environment and Development had unquestionably given renewed urgency to a project first embarked upon in 1978. One of the best contributions the Commission could make to the Decade of International Law would be to complete a set of draft articles on transboundary harm.

67. He noted with satisfaction that all but one of the delegations which had spoken on the subject had welcomed the Commission's decision not to pursue its work on the second part of the topic of relations between States and international organizations. The needs of the international community had evolved in a direction not foreseen at the time when the topic had been included in the programme of work of the Commission. The work already accomplished would, however, remain a valuable source of information not only to scholars, but also to practitioners dealing with legal issues related to international organizations.

68. As for the question of new topics to be included in the Commission's long-term programme of work, the need to identify new areas of work would obviously depend to a large extent on the decision the Committee would adopt on the issue of an international criminal court. If the Commission received the mandate it had requested, it would be very busy for some years to come; if not, there might be some room for new initiatives. In any event, the Commission, at its next session, would carefully consider all proposals made by its members and by Governments.

69. Lastly, referring to the International Law Seminar, which was held concurrently with a part of the Commission's session each year, he stressed the unique nature of the opportunity provided by the Seminar for young

(Mr. Tomuschat)

diplomats and scholars, in particular from third world countries. He therefore reiterated the recommendation in paragraph 391 of the report (A/47/10) that the General Assembly should again appeal to all Governments, especially to those of industrialized States, to make the voluntary contributions that were needed for the holding of the Seminar in 1993 with as broad a participation as possible. As in 1992, the Commission would again endeavour to associate the participants closely with its work by inviting them to deal with one of the topics currently on the agenda. The positive experience gained from that new type of working relationship called for repetition and enlargement.

The meeting rose at 12.35 p.m.

UNITED NATIONS

General Assembly

FORTY-SEVENTH SESSION

Official Records

SIXTH COMMITTEE
31st meeting
held on
Monday, 9 October 1992
at 3 p.m.
New York

SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

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AGENDA ITEM 132: CONSIDERATION OF THE DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER AND OF THE DRAFT OPTIONAL PROTOCOLS THERETO

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A/C.6/47/SR.31
27 November 1992
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The meeting was called to order at 3.25 p.m.

AGENDA ITEM 132: CONSIDERATION OF THE DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER AND OF THE DRAFT OPTIONAL PROTOCOLS THERETO (A/C.6/47/L.8)

1. Mr. TOMKA (Czechoslovakia), reporting orally on the informal consultations concerning the draft articles under consideration, which he had conducted, said that the consultations had been held during eight meetings; it had been agreed that the negotiations should be resumed at the point where they had been left off the previous year. It had been felt that an effort should be made to reach a consensus solution on the draft articles which raised particular difficulties, namely articles 28, 17, 18, 13, 15, 19, 20 and 30; it had been generally considered, however, that progress on article 28 was essential if the negotiations were to be successful on the draft articles as a whole.

2. The text of draft article 28 submitted at the previous session (see A/C.6/46/SR.40) read:

> "1. The diplomatic bag shall be inviolable wherever it may be. Subject to the provisions of paragraphs 2 to 5, it shall not be opened or detained and shall be exempt from examination directly or through electronic or other devices.
>
> "2. If the competent authorities of the receiving State have serious reason to believe that the diplomatic bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of article 25, they may as an exceptional measure request that they examine the bag by electronic or other technical devices routinely used at ports or airports for the examination of incoming or outgoing items in the presence of an authorized representative of the sending State, provided that the examination does not affect the confidentiality of correspondence or documents. The sending State may refuse the examination, in which case the bag shall be returned to its place of origin.
>
> "3. If the request referred to in paragraph 2 is accepted and after the examination the competent authorities of the receiving State still have serious reason to believe that the diplomatic bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of article 25, they may request that the bag be opened.
>
> "4. If the request is accepted, the bag shall be opened by an authorized representative of the sending State in the presence of an authorized representative of the receiving State.

(Mr. Tomka, Czechoslovakia)

"5. If the request is refused by the authorities of the sending State, the bag shall be returned to its place of origin."

3. Some delegations had expressed serious reservations, particularly with regard to paragraphs 2 and 3. Others had criticized the assimilation regime to which diplomatic bags stricto sensu and consular bags were subjected. In order to overcome those difficulties, as Chairman of the consultations, he had submitted for consideration the following draft article 28, entitled "Protection of the diplomatic bag":

"1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened. Subject to paragraph 2, it shall not be detained and shall be exempt from the examination through electronic or other technical devices.

"2. If the competent authorities of the receiving State have serious reason to believe that the diplomatic bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of article 25, they may request, as an exceptional measure, that the bag be examined through electronic or other technical devices routinely used at ports or airports for the examination of incoming or outgoing items, in the presence of an authorized representative of the sending State, provided that the examination does not affect the confidentiality of correspondence or documents. The sending State may refuse the examination, in which case the bag shall be returned to its place of origin."

4. He had explained that the proposal should be understood in conjunction with an amendment to the scope of the draft articles which would be limited to the diplomatic bag within the meaning of article 27 of the 1961 Vienna Convention on Diplomatic Relations. As far as consular bags were concerned, they would continue to be regulated by the provisions of article 35 of the 1963 Vienna Convention on Consular Relations. Some delegations had felt that the proposal departed too much from the relevant provisions of the Vienna Convention on Diplomatic Relations; in that connection, several delegations had stressed that they were satisfied with the existing provisions.

5. Faced with the difficulty of reaching a consensus solution on article 28 which would apply to all bags, one delegation had proposed that the possibility of adopting two separate optional protocols should be considered, one for diplomatic couriers and bags stricto sensu and the other for consular couriers and bags. It had submitted two texts, based largely on the Commission's draft articles but omitting article 28, the substance of which would continue to be regulated by the provisions of the relevant conventions. Despite the interest elicited by that proposal, it had soon been realized that no general agreement could be achieved on the texts.

(Mr. Tomka, Czechoslovakia)

6. In view of the impasse in the consultations, some delegations had felt that the Committee should endeavour to reach consensus on a draft decision whereby the General Assembly would express its appreciation to the Commission for the work carried out under the topic and the draft articles would be sent to Governments for their consideration. However, as consultations proceeded on that proposal, it had become clear that no consensus could be achieved on it either. Some delegations had taken the view that not all possible solutions had been explored, and that the valuable work carried out by the Commission on the topic deserved a continuation of the efforts in search of a solution which only time and mature reflection could bring. Other delegations, however, believed that the consultations had lasted long enough to show that there were serious difficulties in reaching general agreement on basic provisions of the draft.

7. Thus, two possible avenues remained. The first was to send the draft articles back to the Commission, in particular the most controversial ones, so that the Commission could consider them once more with a view to reaching a generally acceptable formulation. Some delegations had opposed that proposal because, in their view, the problem was not one of technical formulation but rather one of lack of agreement on the political basis on which the formulation should be built. It was therefore for the General Assembly, a political body, to try to reach general agreement on the Commission's recommendations.

8. The other avenue consisted in resuming the efforts on article 28 and other controversial articles so as to try to reach some formulations which might be generally acceptable. In order to demonstrate that not all possibilities had been exhausted, one delegation had submitted the following draft article 28, entitled "Protection of the diplomatic bag":

> "1. The diplomatic bag shall be inviolable wherever it may be. It shall be exempt from any examination which may jeopardize the confidentiality of its contents and shall not be opened or detained, except as provided for in paragraph 2.
>
> "2. If the competent authorities of the receiving State or the transit State have serious reasons to believe that the consular bag contains something other than the documents, correspondence or articles referred to in paragraph 1 of article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
>
> "3. The States parties to the present draft articles may at any time declare that, in relation to any other State having made a similar declaration, they shall accept the application of the provisions of paragraph 2 to all diplomatic bags."

(Mr. Tomka, Czechoslovakia)

9. Since no agreement had been reached on that proposal, it had been agreed as a compromise to propose that the item entitled "Consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and of the draft optional protocols thereto" be included in the provisional agenda of the fiftieth session of the General Assembly (A/C.6/47/L.8).

10. The CHAIRMAN suggested that draft decision A/C.6/47/L.8 should be adopted without a vote.

11. Draft decision A/C.6/47/L.8 was adopted without a vote.

12. Mr. MARTINEZ GONDRA (Argentina), explaining his delegation's position on the decision just adopted, said that the Commission had been considering the item for 14 years. In July 1989, after completing a set of draft articles, it had recommended that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles and conclude a convention. In resolution 44/36, the General Assembly had decided to hold informal consultations with a view to facilitating the reaching of a generally acceptable decision in that respect. Those consultations had just been held, and it had not been possible to reach agreement.

13. His Government's position accorded in every respect with the spirit and letter of the relevant international conventions whereby a diplomatic bag was inviolable wherever it might be and could not be opened, detained or subjected to any kind of examination, either directly or through electronic or other technical devices, including those routinely used at ports and airports for the examination of luggage. However, if the competent authorities of the receiving State or the transit State had serious reason to believe that the diplomatic bag contained narcotic drugs, they should be allowed to examine the bag by methods that did not involve any intrusion which could jeopardize the safety or inviolability of the bag. For example, specially trained dogs could be used, in the presence of authorized representatives of the State of origin.

The meeting rose at 3.55 p.m.

UNITED NATIONS

General Assembly

FORTY-SEVENTH SESSION

Official Records

SIXTH COMMITTEE
32nd meeting
held on
Tuesday, 10 November 1992
at 3 p.m.
New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman:	Mr. ZARIF	(Islamic Republic of Iran)
later:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)
later:	Mrs. FLORES (Vice-Chairman)	(Uruguay)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)

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AGENDA ITEM 130: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued)

AGENDA ITEM 135: ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS (continued)

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3 December 1992
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The meeting was called to order at 3.15 p.m.

AGENDA ITEM 130: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued) (A/C.6/47/L.10, A/C.6/47/L.11)

1. Mr. CALERO RODRIGUES (Brazil), Chairman of the Working Group, introducing the report of the Working Group (A/C.6/47/L.10) on jurisdictional immunities of States and their property, said that, after identifying the issues that remained controversial - in particular, the use of terms (art. 2), measures of constraint, and the cases in which State immunity could not be invoked - the members of the Working Group had tried to formulate proposals which, if they were not ideal, at least brought together the different points of view.

2. The Working Group presented its conclusions in paragraph 38. The main conclusion was that it would be desirable for the Working Group to meet again in 1993. The report had two annexes, the first containing the minutes of the meetings of the Working Group and the second containing a proposal on settlement of disputes. That question had not been considered by the Working Group, but most of its members believed that any convention should include provisions in that respect.

3. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

4. Mr. YAMADA (Japan) welcomed the progress that had been made on the topic, both within the Working Group and in the International Law Commission. The latter had taken a practical approach of avoiding theoretical questions relating to the general principle of jurisdictional immunities of States, and the Committee should do the same if it wished to progress in its work on the topic.

5. It would be difficult to delete article 2, paragraph 1 (b) (ii), because constitutional and political systems varied from one State to another; he hoped that a draft acceptable to all States would be formulated on that point.

6. The next two subparagraphs, namely subparagraphs (b) (iii) and (iv), had elicited the most controversy both in the Working Group and in the written comments submitted by Governments. For Japan, certain concepts, for example "the exercise of the sovereign authority", needed to be clarified.

7. On the issue as to whether "political subdivisions" and "agencies or instrumentalities" should be treated differently in separate provisions or equally in a single provision, he believed that the Commission's view was that there were usually provisions under the internal law of a State stipulating the areas in which "political subdivisions" might perform acts in the exercise of sovereign authority and that therefore they were, under such provisions, "entitled" to act in the exercise of sovereign authority. On the other hand, "agencies or instrumentalities" might perform such acts only when empowered by a State to do so, on a case-by-case basis. Hence "political subdivisions" and

(Mr. Yamada, Japan)

"agencies or instrumentalities" were fundamentally and institutionally different, and it was for that reason that the two separate provisions had been formulated.

8. With regard to State enterprises, referred to in article 10, paragraph 3, as it related to "agencies or instrumentalities" of the State, his delegation believed that when certain requirements were met - including possession of an independent legal personality - a State enterprise should be treated in the same manner as a private enterprise. Therefore, a State which established a State enterprise would not in principle be obliged to assume liability for a proceeding relating to a commercial transaction engaged in by that enterprise and would be able to invoke State immunity if the proceeding was instituted against it. In that respect, the question had been raised as to the appropriate placement in the convention of the provision concerning State enterprises. For example, the view had been expressed that it should not be in article 10, paragraph 3, but in article 5, since it should be enunciated in the form of a general principle. His delegation hoped that, following a thorough consideration of the question by States and taking into account the Commission's position, a provision on State enterprises would be formulated.

9. With regard to the criterion determining whether a "commercial transaction" existed, under article 2, paragraph 1 (c), there were two views: for some countries, mainly developed countries, the nature of a transaction should be the sole criterion, while for others, mainly developing countries, the purpose of a transaction should also be taken into account. Among the former countries, some envisaged that problems would arise in respect of paragraph 2 of the same article and argued that judgements as to what should constitute "State practice" tended to be subjective and thus could leave private enterprises and persons which entered into a contract or transaction with a State in an uncertain and disadvantageous position. The Chairman of the Working Group had proposed a compromise formula, and his delegation felt that that was the right course to follow. In particular, it was not convinced of the wisdom of completely excluding the idea of considering the purpose of a contract or transaction.

10. With regard to measures of constraint, and article 18, some States argued that the range of State property against which measures of constraint might be taken should be broader and that where State immunity could not be invoked and judgement was rendered, the State should in principle be of the same status as a private person. Other States, which supported article 18, noted that it was a compromise text designed to satisfy both those advocating absolute immunity and those advocating restrictive immunity. With regard to article 19, his delegation noted that some States wished to have clarification as to the categories of property listed as examples in that article against which measures of constraint would not be taken. As to the relationship between immunity from jurisdiction and immunity from measures of constraint, it was preferable once again to avoid becoming involved in dogmatic discussion and to take a practical approach by focusing efforts on defining in concrete terms the range of properties against which measures of constraint might be taken.

(Mr. Yamada, Japan)

11. It might be necessary to include a dispute settlement clause in the draft convention; the Working Group should start considering such a provision to be referred to an international conference. At all events, it was clear that the momentum existed for formulating an international convention on State immunity. In order to keep that momentum alive, practical solutions must be found to various issues, and the problems identified in the deliberations of the Committee in the previous year, in the written comments of Governments and in the Working Group must be considered. In that respect, his delegation was in favour of holding Working Group meetings at the beginning of the next session, but it hoped that each State would bring with it the results of its own consideration of the problems and proposals so that a compromise acceptable to all States might be found.

12. Japan expected that States and public bodies would increasingly emerge as parties to international transactions and that disputes arising between those States or bodies and Japanese private enterprises would increase accordingly. There were therefore advantages to be gained in the medium and long term by following the position on jurisdictional immunities of States reflected in the draft articles as a whole. His delegation therefore intended to participate actively in the drafting of the convention and in the work of the Working Group.

13. Mr. LIU Daqun (China) said that his delegation believed that the conclusion of a convention on jurisdictional immunities of States and their property was necessary for harmonizing domestic legislation and State practice concerning the subject-matter. As a whole, the draft articles adopted by the Commission on second reading were acceptable and could serve as a good basis. They affirmed jurisdictional immunities of States and their property as a principle of international law, while taking into account the actual needs for strengthening international exchanges, in particular in economic and trade relations. The draft articles also defined some exceptions to the principle of State consent.

14. The Chinese Government attached great significance to the fact that draft article 2 excluded from the definition of "State" those entities established by the State with separate legal personalities. In addition, article 10, paragraph 3, drew a legal distinction between "State" and "State enterprise". Those provisions would help to prevent the abuse of judicial proceedings against States.

15. Likewise, his delegation attached great importance to articles 18 and 19. Immunity of State property from measures of constraint was separate from jurisdictional immunity of the State, and consent to the exercise of jurisdiction did not imply consent to the measures of constraint. Frivolous recourse to measures of constraint against State property not only resulted in harassment of the State concerned but could also give rise to international tensions. From that point of view, articles 18 and 19 served as counterweights to exceptions to the immunities provided for in part III of the

(Mr. Liu Daqun, China)

draft. However, it would be better if article 18 explicitly prohibited any form of pre-judgement measures of constraint against the property of a State and if its provisions applied solely to post-judgement measures of constraint. A number of other articles in the draft also needed to be improved.

16. In any event, his delegation would continue to participate actively in the consultations of the Working Group with a view to finding solutions to the existing differences and paving the way towards the conclusion of a convention.

17. Ms. SEAGROVE (Australia), speaking on behalf of Canada, New Zealand and Australia, said that she wished to focus on three issues, namely: the liabilities and property of separate State enterprises (art. 10, para. 3); the provisions relating to execution of judgements (art. 18); and a mechanism for the settlement of disputes.

18. With regard to the first issue, article 10, paragraph 3, provided that the immunity of a State itself was not abrogated because a separate State corporation entered into a commercial transaction. It followed from that also that it would not be possible to attach the assets of a State or of other State entities in respect of the liabilities of the particular State entity that had entered into the transaction in question. Strictly speaking, that was not an issue of State immunity but an issue of the recognition of the separate existence of State corporations under the relevant law. However, it was important to include some provision dealing with that issue both because it was of great practical importance and because misunderstanding about it might otherwise prejudice the acceptance of the draft articles as a whole. Canada, New Zealand and Australia believed that draft article 10, paragraph 3, stated a principle that was generally applicable in the area of State immunity and was not limited to the topic of commercial transactions. They therefore strongly supported the proposal of the Chairman of the Working Group, referred to in paragraph 31 of the report of the Working Group, that article 10, paragraph 3, should be stated as a generally applicable principle in part II of the draft articles, or as a savings clause in part V. That principle should also extend to the constituent units of a federal State. It should not be possible to sue the State itself in respect of transactions concluded by one of its constituent units, and vice versa.

19. Canada, New Zealand and Australia considered part IV of the draft articles, which dealt with measures of constraint, to be the least satisfactory part of the draft articles. The purpose of the draft articles - which was to give effect to a regime of limited immunity from jurisdiction - would not be achieved in practice unless there was sufficient assurance that there would be compliance with judgements duly given pursuant to the draft articles. As currently drafted, the provisions of part IV made the enforcement of final judgements too difficult. Canada, New Zealand and Australia had welcomed the substantive discussions in the Working Group on that topic, and they took note in particular of the proposal of the Chairman of the Working Group, referred to in paragraphs 21 and 22 of the Group's

(Ms. Seagrove, Australia)

report, that a distinction should be made in article 18 between pre-judgement enforcement on the one hand and post-judgement execution on the other. Such a distinction was fully justified. Considerably more protection was justified at the level of interim measures, where both the jurisdiction of the local court to deal with the merits of the case, and the merits themselves, might still be contested.

20. In terms of the possibility of post-judgement enforcement, the Chairman's proposal to remove the restriction that the property needed to have a connection with the underlying claim or the agency involved was an interesting one. However, even with that restriction removed the conditions for execution would still be such that the possibility of enforcement would be excluded in many cases.

21. In addition, if the draft articles were embodied in an international convention, the convention should contain some mechanism for the resolution of disputes between States parties concerning its proper interpretation and application. Indeed, in any case in which a domestic court assumed jurisdiction over a foreign State, a genuine disagreement could arise between the foreign State and the forum State as to whether the foreign State was entitled to immunity or to particular privileges under the convention. If the dispute could not be resolved by negotiation, there was a likelihood that the foreign State would boycott the proceedings and refuse to recognize any judgement given against it. If the foreign State had no assets in the territory of the forum State, the judgement might remain unsatisfied. If execution were levied against commercial property of the foreign State situated in the territory of the State of the forum, the defendant State might take retaliatory action against assets of the forum State located in the defendant State's territory. That would defeat the purpose of the convention.

22. It was also essential that the dispute settlement mechanism should be speedy and effective and should permit disputes to be resolved at a preliminary stage, before determination of the merits or the giving of judgement. On the other hand, the situation should be avoided in which every domestic proceeding under the convention was preceded by proceedings on the international plane to determine the effect of the draft articles. Australia had, for example, proposed to refer disputes to the chamber of summary procedure established under article 29 of the Statute of the International Court of Justice. That issue should in any case be considered by the Working Group rather than be left for consideration by a diplomatic conference. In that regard, the delegations of Canada, New Zealand and Australia agreed that it was appropriate to defer until 1993 the question of whether to convene a diplomatic conference to conclude a convention. The draft articles should remain subject to consideration by the Working Group of the Sixth Committee until all outstanding issues of principle were settled, including that of a mechanism for the settlement of disputes. Moreover, if the Working Group was able to reach agreement on a final text, there would be no need for a diplomatic conference: the draft convention could instead be submitted directly to the General Assembly for adoption.

23. Mr. ROGAÇHEV (Russian Federation), noting that the draft articles on the jurisdictional immunities of States and their property were a compromise text, said that there was no need to consider whether the text was more favourable to those who advocated limited immunity or those who favoured absolute immunity. On the other hand, it was important to ensure that a balance was established which served the interests of the international community as a whole by removing the possibility of inter-State tension and by ensuring that State immunity or the limitation thereof had no negative economic consequences. The future instrument on jurisdictional immunities should contain precise legal norms but should also be sufficiently flexible as to be able to take account of contemporary international realities and, to a certain extent, of the specific characteristics of national legislation. That was the only way to persuade the largest possible number of States to accede to the future convention, which would serve a purpose only if it was of a universal character.

24. The draft articles under consideration still contained certain weaknesses, particularly with regard to the formula by which immunity was extended to the "constituent units of a Federal State", which lent itself to varying interpretations. The Working Group should pursue its work on the topic in order to arrive at a consensus formulation. More in-depth consideration should also be given to the question of the immunity of the bank accounts of a State used for both commercial and non-commercial transactions. Furthermore, it was regrettable that a common definition had still not been found for the notion of "commercial transactions".

25. The question also arose as to whether, in some cases, national courts, or, in other words, national laws, were being given an exaggerated role by being allowed to decide unilaterally, and with no possibility of appeal, questions relating to the sovereignty of a foreign State. Extrajudicial and amicable settlement mechanisms could be strengthened, for instance, through recourse to the vast array of methods of peaceful settlement and the establishment of effective systems of guarantees. The mechanism of measures of constraint should also be improved. The harmful consequences of the implementation of such measures could undermine all the positive effects of the scheme, with which many States were hardly familiar.

26. The Russian delegation supported the proposal to recommend to the General Assembly that approximately two weeks should be set aside at the beginning of the forty-eighth session so that the Working Group could fully discharge the mandate conferred on it in Assembly resolution 46/55. The Russian delegation invited the many States which had not yet done so to submit written comments and observations on the draft articles and the discussions in the Working Group at the current session.

27. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

28. Mr. SALEEM (India), reviewing the history of the consideration by the Commission and the Sixth Committee of the draft articles on jurisdictional immunities of States and their property, drew attention to draft articles 10, 18 and 19. In his view, draft articles 18 and 19 helped to clarify the scope and nature of the immunities of States and their property in connection with legal proceedings concerning their commercial activities. In particular, the draft articles did not provide for any obligation of a State to post a bond in connection with proceedings in a foreign State, which was often a matter of great concern to developing countries. The draft articles did not exclude the possibility of States providing certification in accordance with their domestic laws and practice.

29. The Indian delegation welcomed the important contribution which the Commission had made in finalizing a set of pragmatic and progressive draft articles; by clarifying the law to a large extent, the draft articles would promote the development of international commercial transactions which took into account the interests of developing countries. Accordingly, his delegation supported the convening by the United Nations of an international conference to adopt an international convention on the subject.

30. The Indian delegation was not in favour of any further amendment to the draft articles being worked out in the Sixth Committee to enable the General Assembly to take a positive decision on the convening of a diplomatic conference. In his delegation's view, the draft articles represented the most balanced position, and any further attempt to shift it one way or another would endanger the prospects of consensus.

31. Ms. BARRETT (United Kingdom) said that, in her Government's view, there were five issues of principle which remained to be resolved in order to pave the way for a generally acceptable convention, namely: the definition of the term "State", the scope and definition of the term "commercial transaction", the concept of segregated State property, measures of constraint and mixed funds. In approaching those key issues, it should be clear that the old rule of absolute immunity was obsolete, and that some of the provisions should be redrafted in that light. Before considering the question of convening a diplomatic conference which would have reasonable prospects of culminating in the conclusion of a generally acceptable convention on the subject, it would be necessary to reach agreement on those parts of the text which appeared to be the most controversial.

32. The discussions in the Working Group had cleared the way for a better understanding of the concerns of delegations. Thus, with regard to draft article 10, paragraph 3, some delegations would prefer, with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise, for any attachment of assets to be carried out solely against the property of the enterprise itself and not against the property of the State. Those delegations were also concerned about high litigation costs. Her delegation shared that concern, and likewise agreed that State immunity could not be invoked in a proceeding against a State enterprise which operated on

(Ms. Barrett, United Kingdom)

its own behalf. In practice, however, matters were not always that simple. When a private party wished to sue a State enterprise, it did not always have sufficient information to determine whether that enterprise operated on its own behalf or as part of the State. Under those circumstances, it would be reasonable to initiate proceedings against both the enterprise and the State. It should be possible, as it was in the United Kingdom, for the court to decide in limine litis which party was the proper defendant; that would have the advantage of limiting the costs from the outset.

33. With regard to the definition of the term "commercial transaction", her delegation endorsed the compromise solution proposed by the Working Group, whereby a court could take into account, in determining whether a contract or transaction was a commercial transaction, the purpose agreed to by the parties at the time of its conclusion.

34. With regard to measures of constraint, draft articles 18 and 19 should be reconsidered since, as currently worded, they were hardly compatible with the concept of limited State immunity. In principle, where a State had lost a case on the merits and where immunity from jurisdiction did not apply, the successful claimant was entitled to a guarantee that the judgement would be satisfied, if necessary, by enforcement, if the defendant State refused to fulfil its obligation. Of course, exceptions should be made for property used by a State for other than government non-commercial purposes, and the categories of property which were immune from measures of constraint should be clearly defined. Accordingly, draft articles 18 and 19 would benefit from substantial recasting.

35. Ms. KOFLER (Austria) welcomed the constructive exchange of views in the Working Group which had contributed to the identification of areas in which general agreement could be reached. Such consultations should be continued at the beginning of the forty-eighth session of the General Assembly with a view to the promotion of general agreement, but they should take place in a concentrated manner within a limited time-frame. At the same time, that consultative process, which would prepare the ground for generally acceptable results, should not detract attention from the objective, properly speaking, which was the convening of an international conference of plenipotentiaries to examine the draft articles and to conclude a convention on the subject.

36. The Working Group should, at the forty-eighth session, consider the question of the convening of such a conference, in order to prepare the ground for a decision by the General Assembly on the subject. For its part, Austria was fully prepared to host such a conference, as it had a tradition of hosting United Nations codification conferences.

37. Mrs. Flores (Uruguay), Vice-Chairman, took the Chair.

38. Mr. FISSENKO (Belarus) said that the draft articles under consideration had achieved a proper balance between the proponents of the absolute and the restrictive theories of immunity. His delegation supported the Working Group's efforts to reach agreement on the various paragraphs and subparagraphs of draft article 2. The formulas which the Group had proposed were fuller and more specific. His delegation was prepared to support the new, more specific wording of draft articles 10, 11 and 18, subject to their consideration by his Government.

39. With regard to the settlement of disputes relating to the application and interpretation of the future convention, the convention should provide for the establishment of a mechanism of consensus. That mechanism should be used prior to the phase of direct negotiations between the countries concerned; those countries could, where appropriate, resort to the good offices of a third party, provided that each stage of the applicable procedure was expressly agreed to by each of the parties to the dispute. In that connection, Belarus could not endorse the Australian proposal concerning draft articles 23 and 24. Belarus would prefer for the provisions on the settlement of disputes which were included in the future convention to be worded in a manner similar to that worked out by the Commission.

40. The Belarusian delegation supported the proposal by the Chairman of the Working Group concerning the procedure for the consideration of the question by the Sixth Committee (A/C.6/47/L.10).

41. Mr. SHIN (Myanmar) welcomed the fact that the draft articles took account of State enterprises and multinational companies, which were a reality of international commerce. State enterprises, which were governed not by public international law but by laws of their own - in particular, commercial law and corporate law - had legal personality and could sue or be sued in a court of law. In commercial contracts with multinational companies, State enterprises were bound to discharge their obligations under the law governing commercial contracts. However, privity of contract existed only between multinational companies and State enterprises and not between multinational companies and the State.

42. In recognizing the jurisdictional immunity of ships owned or operated by a State and used exclusively for non-commercial purposes, article 16 endorsed a custom long established in international law and confirmed in 1982 by articles 32 and 96 of the United Nations Convention on the Law of the Sea. State-owned commercial ships belonged to a different category and therefore came under the jurisdiction of the court of the forum State. It should be noted that paragraph 3 of the draft articles listed only certain forms of operation of a ship, to which such other forms as towage, maritime liens, flags of convenience, charter parties and bills of lading should also be added. The same applied, by analogy, to the operation of aircraft, which, however, were not covered by the draft articles. His delegation considered that the subject of ships and aircraft should be discussed in greater detail in the light of shipping law and air and space law.

(Mr. Shin, Myanmar)

43. With regard to the settlement of disputes, he remarked that in view of the existence of numerous arbitration regimes corresponding to different legal systems, it would be useful to carry out an in-depth comparative study before choosing a particular regime.

44. Mr. FONBAUSTIER (France) said that his Government had, from the outset taken a favourable view of considering the possibilities of codification of the law of jurisdictional immunities of States and their property, a highly technical legal topic of obvious interest to States. The subject was, of course, a difficult one, being situated at the borderline between private and public international law, and it gave rise to controversies as to both doctrine and jurisprudence. Furthermore, customary international law in that field was somewhat limited; such conventions as existed had not received a large number of ratifications; and national laws on the subject varied a good deal. All those factors militated in favour of codification.

45. His delegation considered that the draft in its present version could be viewed as generally satisfactory as regards both substance and design. Some amendments, however, remained desirable, in particular on the question of immunity from measures of execution. His delegation also favoured the convening of an international conference which would be held in 1994 or later and which should be prepared with care.

46. His delegation agreed that the Working Group should continue its work for two full weeks at the beginning of the next session, an arrangement that should enable the Committee to complete the detailed consideration of the draft articles and to decide at the next session upon the holding of a diplomatic conference and its date.

47. Mr. POLITI (Italy) said that some of the Special Rapporteur's proposals on the draft articles on jurisdictional immunities of States and their property, especially those concerning paragraph 2, as well as the ideas and formulations suggested in connection with draft articles 18 and 19, deserved special attention. A number of issues still remained outstanding, however, and should be given careful consideration with a view to resolving existing differences.

48. His delegation welcomed the decision to re-establish the Working Group of the Sixth Committee at the forty-eighth session in order to continue consideration of the topic of jurisdictional immunities. It also supported the idea of setting aside the first two weeks of the next session for that purpose. The elaboration of a convention would greatly contribute to the codification and progressive development of international law, and all efforts should be made to define a regime that could obtain the widest possible support.

49. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

50. Mr. KOROMA (Sierra Leone) expressed surprise at the reopening of the discussion on matters which had appeared to be settled. Most of the arguments advanced had already been heard and answered in the International Law Commission as well as in the Committee. It was, of course, always possible to improve a text, but the draft articles represented a compromise the balance of which ought not to be disturbed. His delegation, for its part, accepted the draft although certain articles, such as that dealing with measures of constraint, failed to satisfy it fully. He invited other delegations to refrain from reopening the debate.

51. His delegation accepted the idea of holding a session of two weeks during the forty-eighth session of the General Assembly to consider the draft articles, and also favoured the convening of a diplomatic conference to conclude a convention on the topic.

Draft decision A/C.6/47/L.11

52. Mr. CALERO RODRIGUES (Brazil), speaking as the Chairman of the Working Group established under General Assembly resolution 46/55, introduced the draft decision contained in document A/C.6/47/L.11 and read out its main provisions.

53. Mr. CHATURREDI (India), explaining his position, said that he saw no point in devoting two weeks to working on the topic of jurisdictional immunities of States. His delegation considered that an international conference should be convened with a view to concluding a convention on the subject.

54. Mr. KOROMA (Sierra Leone), also speaking in explanation of position, associated himself with the Indian representative's remarks, adding that not all delegations could be represented in the Sixth Committee at the very beginning of the session, so that a certain imbalance might result.

55. The CHAIRMAN said that he understood it to be the wish of the Committee to adopt the draft decision under consideration without a vote.

56. Draft decision A/C.6/47/L.11 was adopted.

AGENDA ITEM 135: ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS (continued) (A/C.6/47/L.9)

57. Mrs. FLORES (Uruguay), introducing draft resolution A/C.6/47/L.9 in her capacity as chairperson of the informal consultations on the preparation of an additional protocol on consular functions to the Vienna Convention on Consular Relations, read out the operative part of the draft resolution.

58. Mr. CHATURREDI (India), explaining his position, expressed regret that the draft resolution did not mention the report of the Chairman of the Working Group.

59. The CHAIRMAN said that he understood it to be the wish of the Committee to adopt the draft under consideration without a vote.

60. Draft resolution A/C.6/47/L.9 was adopted.

The meeting rose at 5.30 p.m.